

Order

Michigan Supreme Court
Lansing, Michigan

May 19, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2008-13

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed New Rule
1.15A of the Michigan Rules
of Professional Conduct

On order of the Court, this is to advise that the Court is considering the adoption of proposed new Rule 1.15A of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[This proposal is a new rule.]

Rule 1.15A Trust Account Overdraft Notification

- (a) Scope. Lawyers who practice law in this jurisdiction shall deposit all funds held in trust in accordance with Rule 1.15. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.
- (1) “Lawyer” includes a law firm or other organization with which a lawyer is professionally associated.
 - (2) For any trust account which is an IOLTA account pursuant to Rule 1.15, the “Notice to Eligible Financial Institution” shall constitute notice to the depository institution that such account is subject to this rule. Lawyers shall clearly identify any other accounts in which funds are held in trust as “trust” or “escrow” accounts, lawyers must inform the depository institution that such other accounts are trust accounts for the purposes of this rule.
- (b) Overdraft Notification Agreement Required. In addition to meeting the requirements of Rule 1.15, each bank, credit union, savings and loan association, savings bank, or open-end investment company registered with the Securities and Exchange Commission (hereinafter “financial institution”) referred to in Rule 1.15 must be approved by the State Bar of Michigan in order to serve as a depository

for lawyer trust accounts. To apply for approval, financial institutions must file with the State Bar of Michigan a signed agreement, in a form provided by the State Bar of Michigan, that it will submit the reports required in paragraph D of this rule to the Attorney Grievance Commission and the trust account holder when any properly payable instrument is presented against a lawyer trust account containing insufficient funds or when any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit is honored and irrespective of any overdraft protection or other similar privileges that may attach to such account. The agreement shall apply to the financial institution for all of its locations in Michigan and cannot be canceled except on 120 days notice in writing to the State Bar of Michigan. Upon notice of cancellation or termination of the agreement, the financial institution must notify all holders of trust accounts subject to the provisions of this rule at least 90 days before termination of approved status that the financial institution will no longer be approved to hold such trust accounts.

- (c) The State Bar of Michigan shall establish guidelines regarding the process of approving and terminating “approved status” for financial institutions, and for other operational procedures, to effectuate this rule. The State Bar of Michigan shall periodically publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that has not been so approved. Approved status under this rule does not substitute for “eligible financial institution” status under Rule 1.15.
- (d) Overdraft Reports. The overdraft notification agreement must provide that all reports made by the financial institution contain the following information in a form acceptable to the State Bar of Michigan:
 - (1) The identity of the financial institution
 - (2) The identity of the account holder
 - (3) The account number
 - (4) Information identifying the transaction item
 - (5) The amount and date of the overdraft and either the amount of the returned instrument or other dishonored debit to the account and the date returned or dishonored, or the date of presentation for payment and the date paid.

The financial institution must provide the information required by the notification agreement within five banking days of the date the item was paid or returned unpaid.

- (e) **Costs.** Nothing in these rules precludes a financial institution from charging the lawyer for the reasonable cost of providing the reports and records required by this rule, but those costs may not be charged against principal, nor against interest or dividends earned on trust accounts, including earnings on IOLTA accounts payable to the Michigan State Bar Foundation under Rule 1.15. Such costs, if charged, shall not be borne by clients.
- (f) **Notification by Lawyers.** Every lawyer who receives notification that any instrument presented against the trust account was presented against insufficient funds or that any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit was honored, shall provide the Attorney Grievance Commission, in writing, within 21 days of issuance of such notification, a full explanation of the cause of the overdraft and how it was corrected.
- (g) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the requirements mandated by this rule and shall be deemed to have consented under applicable privacy laws, including those of the Gramm-Leach-Bliley Act, 15 USC 6801, to the reporting of information required by this rule.

Staff Comment: This proposal, submitted by the State Bar of Michigan, would require attorneys to maintain client trust accounts in approved financial institutions. The financial institutions would become approved by, among other requirements, agreeing to notify the Attorney Grievance Commission and the lawyer if a lawyer's trust account is overdrawn. The lawyer then would be required to submit an explanation of the overdraft to the commission within 21 days. The proposal is intended to provide an early warning of improprieties so that corrective action may be taken.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or

MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-13. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 19, 2009

Corbin R. Davis

Clerk